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Nos. 85-971 and 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE,
Comptroller of the Currency,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE CONSUMER BANKERS ASSOCIATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The Consumer Bankers Association (CBA) is a non-profit organization founded in 1919. It provides a national voice for the consumer financial services industry. The membership of CBA includes over 600 commercial banks of all sizes, as well as thrift institutions, credit

unions and others. Many of the major national banks in the United States are CBA members. Combined, the CBA membership holds over 70 percent of all the outstanding consumer credit held by commercial banks and over 80 percent of the consumer deposit accounts held by commercial banks.

CBA members are vitally affected and directly concerned with the proper interpretation of federal banking laws such as the McFadden Act. Until the decisions below, this law and the federal policies pre-dating and underlying its passage had been generally interpreted by federal authorities, and were understood by the national banking community, as authorizing a wide array of national banking activities without locational constraint. Indeed, McFadden (at 12 U.S.C. § 36(f)) expressly addresses the location of only three activities—taking deposits, paying checks and lending money.

The decisions below read McFadden as restricting *all* national banking activities to branch or headquarters locations. In their wake, they subject to challenge any national banking operations conducted at places other than a bank headquarters or branch office. In effect, these decisions threaten a torrent of litigation undermining 200 years of national policies and practices aimed at fostering the efficient and convenient provision of consumer financial services nationwide.

The national banking industry and consumer financial services marketplace have been cast into uncertainty and disarray by the revisionist interpretations of federal law in the decisions below. The views presented with consent of the parties in this brief will aid the Court in assessing the scope and historical purposes and experiences underlying McFadden and related federal laws and policies in this area. Ultimately, amicus curiae respectfully submits that those assessments will encourage the Court to overturn the decisions below.

SUMMARY OF THE ARGUMENT

The decisions below should be overturned because they (1) misconstrue the McFadden Act and directly contradict federal policies pre-dating and underlying it's passage, and (2) interpret the Act in a fashion that is incompatible with the American historical experience and national policies favoring the efficient and convenient provision of consumer financial services.

ARGUMENT

I. The Novel Interpretations of the McFadden Act in the Decisions Below Directly Contradict Federal Policies Pre-dating and Underlying It's Passage

Crucial to the reasoning of the courts below is the novel proposition that the McFadden Act (McFadden)[1] was enacted to limit the provision of banking services by national banks. Neither the historical context nor the underlying congressional intentions and actions support this view.

A. The McFadden Act Confirmed the Right of National Banks to Offer Banking Services At Multiple Locations

Federal banking law, policy and practice pre-dating the 1927 passage of McFadden authorized the provision of national banking services at multiple locations in both substance and effect.

Section 8 of the National Bank Act[2] provided, prior to McFadden's passage, that "(t)he general business of each national banking association shall be transacted in *the place* specified in its organization certificate." (em-

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[1] Act of February 25, 1927, c.191, §§ 7-8, 44 Stat. 1228-1229, as amended by Act of June 16, 1933, c.89, § 23, 48 Stat. 189, 190; presently codified, in pertinent part, at 12 U.S.C. §§ 36 and -81.

[2] Act of June 3, 1864, c.106, § 8, 13 Stat. 101 is presently codified at 12 U.S.C. § 81.

phasis added) Section 6 of the Act [3] requires a national association's organization certificate to specifically state ". . . (t)he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village." While the foregoing provisions may not be construed fairly to authorize the establishment of an unlimited number of national banks or branches within the designated "place", 29 Op. Atty. Gen. 81 (1911); see, also, State ex rel. Barrett v. First Nat. Bank, 297 Mo. 397, 249 S.W. 619 (1923), restored for argument, 262 U.S. 732 (1923), aff'd, 263 U.S. 640 (1924), it has long been apparent to this court that the designated "place" means one of the enumerated geographic areas and not a particular office or building, McCormick v. Market Nat. Bank, 162 Ill. 100, 44 N.E. 381 (1896), aff'd, 165 U.S. 538 (1987).

The National Bank Act was amended in 1865 to make it clear that state banks could retain their branches upon converting to national charters [4], thereby effectively authorizing the provision of national banking services at multiple locations more than 60 years before McFadden. From time to time, special acts of Congress were also passed permitting national banks to establish branches to serve consumers at various scientific and trade expositions around the nation [5] In 1886, Congress further underscored its determination not to specifically limit the situs of national banking activities by permitting associations to move the location of their discount and deposit operations within a 30 mile intra-state radius, subject only to prior shareholder and Comptroller approvals [6].

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[3] Act of June 3, 1864, c.106, § 6, 13 Stat. 101, is presently codified at 12 U.S.C. § 22.

[4] Act of March 3, 1865, c.78, § 7, 13 Stat. 484, now codified as a part of 12 U.S.C. § 36.

[5] State ex rel. Barrett, supra.

[6] Act of May 1, 1886, c.73, § 2, 24 Stat. 18, presently codified at 12 U.S.C. § 30.

In 1923, the Attorney General of the United States upheld the so-called "teller's window" rule adopted by the Comptroller, 34 Op. Att'y Gen. 1 (1923). That rule and the Attorney General's opinion distinguished between full-fledged branches and "additional offices" performing routine deposit and check cashing services in concluding that the teller's window was an authorized non-branch national bank operation.

Finally, the provisions of McFadden itself confirm the long-standing federal policies and practices permitting national banks to offer services at multiple locations. McFadden not only authorized national bank's to establish branches, it also permitted national (and converting state) banks to *retain* and operate pre-existing branches and authorized national banks to establish, in limited instances, "seasonal agencies" in resort communities to offer check cashing, deposit and related services, see 12 U.S.C. §§ 36(a), -36(b) and -36(c), respectively. Further, it did not address the "teller's window" or additional offices ruling, thereby upholding it by implication.

Federal policies and practices pre-dating McFadden's enactment evidence no particular congressional concern with strictly limiting the operations of national banks to particular facilities. McFadden itself does not expressly limit all national banking operations to branch offices per se. Nor does it contain an express statutory requirement that all business of a national bank shall be conducted at its "main office." To the extent that the courts below find in McFadden such restrictive purposes and requirements, it is respectfully submitted that they misread not only the language of the statute, but also the historical context and federal polices and actions preceding and underlying the law's passage. The strained reading in the decisions below of 12 U.S.C. § 81 in particular is as novel as it is incorrect.

B. McFadden Expanded The Authority Of National Banks to Provide Consumer Financial Services

During the first half of the nineteenth century, despite heavy anti-bank sentiment, there was little legislative activity at either the state or federal level designed to limit bank branching. The First Bank of the United States was organized in 1791 in Philadelphia and established branches in a number of cities around the new country. The legislative debates that accompanied the National Bank Act establishing the national banking system reveal no concern about banks expanding their economic bases through unrestrained branching. That lack of attention is fully understandable in light of the nature and shape of the market then being served. In a primarily rural economy, consumers expected to seek products and services of all types from the nearest population center. There was no expectation that financial or any other services would be situated more efficiently or conveniently.

Perhaps as a function of the understandable lack of congressional concern, early federal decisions interpreted the National Bank Act to prohibit formal branching, First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), see also 29 Op. Att'y Gen. 81, 98 (1911). The issue was relatively unimportant to federal concerns focused on the preservation and encouragement of the dual banking system, however, since state banks were generally similarly limited by law or circumstance. That fact, combined with liberal chartering policies, resulted in a record number of bank offices throughout the country. In view of this proliferation of banks, the financial needs of businesses and consumers were met and there appeared to be little demand for added services through branching systems.

By the early 1900's, however, state banks were beginning to seek and obtain expanded authority to branch in order to serve their expanding geographic market-

places. Competitive pressures on national banks resulted in the previously discussed "teller's window" rule under which national banks could operate limited-service offices and agencies in the city in which they were located.[7]

This rule, together with the increasing branching authorization given to state-chartered banks, led to the passage in 1927 of the McFadden Act. The law was designed to increase the level of competitive equality between national and state-chartered banks and thereby preserve the consumer benefits and integrity of the dual banking system.

In order to effect these objectives, McFadden *expanded* consumer financial services powers of national banks by granting them explicit authority to open branches in the cities in which they were located if state-chartered banks had similar authority. Clearly, changes in consumer interests and needs were major factors encouraging this expansion of national bank authority. As stated by one member of Congress in explaining his vote in favor of such expansion:

> "I am persuaded to vote for this measure for the reason that crowded conditions, traffic regulations, lack of parking facilities in our cities necessitate some change in banking facilities to suit the convenience of the complex and crowded business world. Banks, bankers, and customers in large cities are in a situation similar to telephone, electric light and gas companies, or the post office, all of which have branches for the customer's convenience. Economy in time, energy, and many other factors demand that the old order give away to a modern and sensible plan. Party traditions and prejudices should not fetter or bind us to the detriment of our country or the service of our constituents."

66 CONG. REC. 1775 (1925) (remarks of Rep. Watkins)

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[7] Financial Services: The Changing Institutions and Government Policy, George J. Benston, Ed., Prentice-Hall, Inc. (1983), p. 13-14.

One effect of the McFadden Act was to reopen the issue of branch banking in the state legislatures. During the ensuing two or three years, a number of states enacted restrictions on branching within their states that applied not only to state-chartered banks but also, through the operation of the McFadden Act, to national banks. By 1930, the laws of 22 states prohibited branching.[8]

Following the Depression and the collapse of a number of banks, however, it was seen that unit banks fared relatively poorly in the struggle to survive as compared to banks with branches. As a result, between 1930 and 1935, 15 states either liberalized existing restrictions or enacted liberal branching laws for the first time. One impetus for this activity was the hope that failing banks could be merged with, or possibly become branches of, stronger institutions.[9]

To preserve competitive equilibrium in the dual banking system, Congress amended McFadden in 1933[10] to enable national banks to branch anywhere within a state that a state-chartered bank could branch. Once again, the authority of national banks to offer consumer financial services was expanded to better serve the convenience and needs of the changing society.

The decisions below cut directly against the grain of these developments in regarding the McFadden and Glass-Steagall changes as restrictions on the provision of consumer financial services. Worse, in straining to reach this perspective, they threaten to undermine long-

[8] Financial Services Industry—Oversight; Hearings Before the Committee on Banking, Housing and Urban Affairs of the United States Senate, Part I, 98th Cong., 1st Sess. (1983), p. 406-407. (statement of Frederick S. Hammer, E.V.P., Chase Manhattan Bank, N.A.)

[9] Id.

[10] Act of June 16, 1933, c.89, § 23, 48 Stat. 189, 190 (the Glass-Steagall Act).

standing federal policies underlying the progressive historical expansion of national bank authority and competitive equality in these areas. Ironically, these decisions substantially constrain national banking activities through a misinterpretation of federal laws and policies intended to have precisely the opposite effect.

C. The Decisions Below Effectively Undermine The Objectives of the Federal Reserve System

Another of the primary reasons for the passage of the McFadden Act was to encourage membership in the newly created Federal Reserve System (FRS).[11] With state banks being able to branch and national banks prohibited from branching, there was no incentive for state banks to join the system and considerable reason for national banks to convert to state charters and leave the FRS.[12] The FRS's control over the banking system was thereby weakened, contrary to the objectives of its enabling legislation.

To counter this trend, the Federal Reserve joined the chorus of those advocating the McFadden expansion of national banking authority.[13] To encourage FRS membership and further assure competitive equality between state, state member and national banks, state member banks were also covered by the branching rule. The "proviso" clause of 12 U.S.C. § 321[14], as interpreted in

[11] Financial Services: The Changing Institutions and Government Policy, George J. Benston, Ed., Prentice-Hall, Inc. (1983), p. 13-14.

[12] Id.

[13] Id.

[14] 12 U.S.C. § 321 reads, in pertinent part, as follows:

> *Provided, however,* That nothing herein contained shall prevent State member banks from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are

the FRS's Regulation H, 12 CFR § 208 et seq., and by most legal commentators, requires that branches of member banks must be established on the same terms and conditions as are applicable to branches of national banks under McFadden.[15]

As a result, the national banking restrictions embodied in the decisions below effectively limit the activities of state member banks. This places both national and state member banks at a competitive disadvantage with other institutions. These results directly conflict with some of the fundamental objectives of the Federal Reserve [16] and McFadden Acts. Once again, it is apparent that the decisions below effectively undermine the very federal banking policies and laws they purport to uphold.

II. The Decisions Below Are Incompatible With National Policies Favoring the Efficient and Convenient Provision of Consumer Financial Services

The review of federal actions and policies pre-dating and underlying enactment of the McFadden Act evidences the national priority accorded to the progressive expansion of consumer financial services. As the nation grew, the dual banking system evolved in part to ensure

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applicable to the establishment of branches by *national banks* except that the approval of the Board of Governors of the Federal Reserve System, instead of the Comptroller of the Currency, shall be obtained before any State member bank may hereafter establish any branch and before any State bank hereafter admitted to membership may retain any branch established after February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated. (Emphasis added)

[15] Hearings on S. 2898 (To Promote Participation in Shared ATM Networks) Before the Committee on Banking, Housing and Urban Affairs, United States Senate, 98th Cong., 2d Sess. (1984), p. 65 (statement of Roland E. Brandel, Esq.)

[16] Act of Dec. 23, 1913, c.6, § 9, 38 Stat. 259, 12 U.S.C. §§ 221 et seq.

a continually improving responsiveness to the consumer financial services needs of a changing society. Increased competition directly benefitted consumers by ensuring the efficient and convenient provision of financial services nationwide.

The decisions below effectively limit the ability of national banks to adhere to these priorities. By requiring all national banking activities to be situated in the traditional brick and mortar of a main office or branch, these decisions choose to ignore logistical efficiency, the consumer's convenience and the realities of the contemporary marketplace. They effectively frustrate the efficient provision of national banking services by turning a blind eye to the social, economic and technological developments of the last 60 years.

By effectively hobbling one of the engines of federal consumer financial services policy, the decisions below represent an ill-considered approach to modern consumer affairs. The decisions below are incompatible with the national priorities in this area and should be overturned.

A. The "Constraints" In McFadden Are Aimed At Limiting Concentration Of Financial Resources, Not Geographic Diversity

Fundamental to the decisions below is the view that the locational restrictions of McFadden are an end unto themselves; that the law was specifically designed to geographically restrict the activities of national banks. We respectfully submit that this view lacks historical economic, social and political merit. In fact, the geographical constraints in McFadden were designed to prevent massive concentration of financial resources, to limit corporate ownership of banks and to insure local control.

American banking policies have always recognized the importance of encouraging a diverse banking system to

serve the interests and needs of a society founded on diversity. Limitations on the concentration of power over the nation's financial resources have long been regarded as essential to insuring the convenient and efficient provision of consumer services to the communities of the nation.

The federal government, over a 200 year history, has consistently reaffirmed its belief that decentralized control of banking structure provides the primary safeguard against undue concentration of financial resources. The veto by President Andrew Jackson in 1829 of the extension of the charter of the Second Bank of the United States, the enactment of the National Banking Act creating the dual banking system, and those provisions of the Federal Reserve System Act of 1913 [17] which created a series of regional reserve banks rather than a single central bank, were political and philosophical decisions designed to limit the concentration of power over financial resources.

So too were the passages, subsequent to McFadden, of the Federal Deposit Insurance Act,[18] assuring the continued survival of thousands of both small and large banks, and the Bank Holding Company Act of 1956, as amended in 1970,[19] reserving continuing control of bank structure to the states.

The decisions below suggest that McFadden should be read in a vacuum segregated from these economic and political realities. It is respectfully submitted that it

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[17] Id.

[18] Act of June 16, 1933, c.89, § 8, 48 Stat. 168, as amended (added section 12B to the Federal Reserve Act, originally codified at 12 U.S.C. § 264, now codified at 12 U.S.C. §§ 1811 et seq.).

[19] Act of May 9, 1956, c.240, § 2, 70 Stat. 133 (as amended by Act of Dec. 31, 1970, Pub. L. 91-607, Title I, § 101, 84 Stat. 1760) (presently codified at 12 U.S.C. § 1841).

cannot be properly read out of context with the national experience.

McFadden may be characterized as the lynch-pin insuring the continued diversity, creativity and innovation inherent in a decentralized banking system. Several key aspects of the American banking system that contribute to its strength and effectiveness derive directly from McFadden, including local control, competitive diversity, duality and national focus.

By retaining to the states the effective control of bank structure, McFadden embodies the longstanding federal recognition of the profoundly local concerns and interests that must be served by the banking community, Lewis, Comptroller of Florida v. BT Investment Managers, Inc., et al., 447 U.S. 27 (1980).

McFadden has fostered a financial diversity unparalleled in the Western world. Units of all sizes comprise the American banking system; the approximately 13,000 commercial banks range in asset size from over $100 billion down to less than a million. The largest banking organizations are approximately 1000 times as large as banks of average size.[20] Because of this multiplicity and disparity in sizes of institutions deriving from McFadden's prescription for local controls, there are far more financial services options available to the American consumer than exist in most, if not all, other nations![21]

In maintaining the equality of structural opportunities for national banks, McFadden fosters another major facet of the American banking system—duality.

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[20] Financial Services Industry—Oversight; Hearings Before the Committee on Banking, Housing and Urban Affairs of the United States Senate, Part II, 98th Cong., 1st Sess. (1983), p. 27 (statement of Sidney A. Bailey).

[21] Id.

The importance of the dual banking system to the consumer is nowhere more strongly evidenced than in its ability to encourage competitive innovation.

One system or another will develop new competitive approaches which, if proven useful, will be accepted universally. The various state systems usually have served as laboratories for change; occasionally, the federal system has so served. A noted state initiative is the NOW account. One could cite others. The critical element has been a creative tension between the two systems which leads to innovation and its diffusion. It is an essential attribute of the American banking system, one fostered and preserved by McFadden's passage, and a primary reason for its success.

McFadden's constraints are not aimed at restricting the ability of national banks to provide efficient and convenient consumer financial services. Indeed, they are directed toward encouraging the provision of such services by both state and federally-chartered banks. The decisions below, however, effectively frustrate these objectives in viewing McFadden as nothing more than a geographic barrier. They truly miss the forest for the trees by ignoring American banking's decentralized heritage and McFadden's anti-concentration objectives.

It is important to recall that the federal anti-trust laws are not responsible for the decentralized nature of the dual banking system. Although enacted almost a century ago, antitrust laws were not applied to banking until 1960. The antitrust laws always have applied to most other industries, yet, none of these industries exhibit the unconcentrated diversity of the 13,000 plus members of the commercial banking system. Only McFadden and related federal dual banking system policies are responsible for the decentralization that has resulted in the unparalleled competitive vigor of the American banking experience.

By ignoring McFadden's anti-concentration objectives and effects, the courts below unjustifiably limited the scopes of their interpretive reviews and their analyses are critically flawed as a result.

B. The Restrictive View of McFadden in the Decisions Below Ignores the Realities of the National Consumer Financial Services Marketplace

The decisions below virtually imply a federal policy intent on limiting the development of a national banking economy. This discussion has shown that such a policy has never existed. The following discussion focuses briefly on the truly national marketplace that federal policies have intentionally fostered.

A notable feature of the American system is its broad national applicability. Despite arguments that it is "state-bound," nothing could be further from the truth. With respect to most facets of banking—corporate and retail alike—a financial institution with the resources and the commitment can offer its services nationally.

On the corporate side, there is an expansion of nationwide lending, deposit-taking, data processing and other services through broad networks of loan production offices, calling officers, lockbox systems and specialized holding company affiliates.

On the retail side, many services are offered across state lines. Holding company subsidiaries offer consumer and retail mortgage credit services; many major banks have developed substantial credit card portfolios on an interstate basis and extensive interstate debit card systems are under development.

The ease with which funds flow through the system is augmented by several major elements of the financial network. One is the correspondent banking system where funds readily flow up and down the banking ladder and through which the most sophisticated services are pro-

vided. A second element is the easy access banks and other financial intemediaries have to national secondary markets such as those serving the residential mortgage and student loan markets. A third is the federal funds market, through which banks of all sizes buy and sell funds on a short-term basis.

Finally, the growing sophistication of the technology of today is a harbinger of fully electronic network banking tomorrow. Indeed, the technology already exists for statewide, regional, nationwide and even worldwide communication of financial information. These systems allow local institutions to exercise a favorable degree of control over the allocation of financial resources from each area. Each bank determines daily whether to buy or sell funds, thus insuring that individuals and communities have a voice in the allocation of their financial resources and that funds are available when local needs dictate. Conversely, when local needs are not strong, capital flows in response to needs of the nationwide market.

Using all these tools, modern consumer banking is clearly seen to be national in scope. The only element of banking which is heavily restricted is retail deposit-taking authority. Even here, states have moved to relax this restriction, and interstate gathering of retail deposits by mail remains a common occurrence.

The decisions below characterize McFadden as a geographic restriction on the rendering of national banking services. From the foregoing, then, it is clear that McFadden has been a dismal failure. Yet, that law has not been repealed and its operative philosophy has been incorporated subsequently in the Bank Holding Company Act. Either the courts below or Congress, the American consumer and the financial services marketplace are laboring under a misapprehension as to its efficacy.

It is respectfully submitted that the McFadden Act was never intended to place a geographic roadblock to

the nationwide provision of consumer financial services. Federal policies, historical experience and economic events pre-dating and subsequent to its passage underscore this. In erecting such a roadblock, the decisions below find no support in these policies, experiences and events. They should not be permitted to frustrate longstanding national objectives favoring the efficient and convenient provision of consumer financial services.

CONCLUSION

The decisions below have effectively hobbled the ability of the dual banking system to efficiently serve the consumer's convenience and needs. They ignore 200 years of progressively expansionist federal policies intended to effectuate these objects. They constitute a revisionist view of the federal banking law they purport to interpret. Their preoccupation with the brick and mortar provision of banking services is simply out of sync with contemporary market realities. They create significant uncertainty within the ranks of both national and Federal Reserve member institutions as to the propriety of the most de minimis of non-branch activities. The decisions below effectively undermine some of the major purposes and most beneficial effects of federal consumer financial services law and policy and should be overturned.

Respectfully Submitted,

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